SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 60

MIKE MARVICH, PETITIONER,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA AND CLYDE I. PLUMMER, WARDEN, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 17, 1943.

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[fol. a] [File endorsement omitted]

[fol. 1]

IN SUPREME COURT OF THE STATE OF CALIFORNIA

Crim. No. 4490

In the Matter of the Application of MIKE MARVICH, For the Writ of Habeas Corpus,

THE PEOPLE OF THE STATE OF CALIFORNIA, and CLYDE I. PLUMMER, Warden, et al., Respondents

PETITION FOR WRIT OF HABEAS CORPUS—Filed March 15, 1943

To Honorable Jesse W. Carter, Associate Justice of the Supreme Court of the State of California, Greetings:

This application and petition of Mike Marvich, for the writ of habeas corpus, respectfully represents and shows to this Honorable Court:

I

That your petitioner, Mike Marvich, who is a natural born citizen of the United States, over the age of 21 years, is now illegally and unlawfully imprisoned, confined, restrained and deprived of his lawful right to liberty, by the People of the State of California, and Clyde I. Plummer, Warden, et al., by imprisonment in the State Prison of the State of California at Folsom, within the County of Sacramento, in the State of California, contrary to and in violation of the Privileges and Immunities, Due Process of Law, and Equal Protection of the Laws clauses of Article XIV, [fol. 2] Section I, of the Amendment to the Constitution of the United States, and contrary to and in violation of similar provisions of Article I, Section 13, of the Constitution of California, and in violation of Section 681 of the Penal Code of California, for reasons immediately hereinafter made to appear.

II

That prior to the date hereof and on the 1st day of August, 1940, petitioner had two preliminary examinations in the Municipal Court of the City of Long Beach, County of Los Angeles, State of California, on two separate charges of the crime of Robbery, case Nos. F-182 and F-183,

both Felonies and a prior conviction of Felony. Petitioner entered pleas of not guilty to each charge. This action was had in Department No. 3, of the above said Court, Honorable Wilber F. Downs, Judge presiding.

III

That upon the perjured testimony of an ex-convict, Eddie Black, the State's main witness, petitioner was held to answer in the Superior Court of the State of California, in and for the County of Los Angeles. (See Exhibit "A and B".)

IV

That on the 15th day of August, 1940, the District Attorney of the above said County and State, filed two separate Informations against petitioner based upon the perjured testimony as shown by Exhibit "A".

[fol. 3]

V

That petitioner was placed on trial upon the said informations secured by the use of perjured testimony, Exhibit "A", and upon stipulation of counsel the two informations were consolidated and petitioner was tried before the same jury with a co-defendant charged in one of the informations. The State's witness Eddie Black testified in substances as he did at the preliminary hearing, upon direct examination, see Exhibit "A", but shortly after cross examination started, a recess was called, and after recess Eddie Black the State's witness again took the witness stand upon direct examination and testified that he had been giving perjured testimony at the preliminary hearing and upon the first direct examination, but now wished to tell the truth and told a different story. Upon cross examination, said witness stated that he had been talking to the prosecutor and Deputy Sheriff A. B. Mason during the recess. This first trial was in the said Superior Court, County and State, Honorable George Dockweiler, Judge presiding in Department C, at Long Beach, California, the Honorable Leslie E. Still, Judge of Said Court was to receive the verdict from the jury, but the jury was unable to agree upon a verdict and the Honorable Leslie E. Still, Judge of said Court declared a mistrial.

VI

That petitioner was again placed upon trial on the consolidated causes November 18th, 1940, in Department B, of said Superior Court Honorable Leslie E. Still, Judge [fol. 4] presiding. The State's witness Eddie Black changed his testimony again on the second trial (See Exhibit "B") and during cross examination of said State's witness at a perceeding out of the hearing of the jury and petitioner, the trial Judge, prosecutor and petitioner's attorney all conceded that said State's witness was giving perjured testimony. (See Exhibit "C".)

VII

That the prosecutor in his argument to the jury vouched for the truthfulness of said State's witness testimony, knowing that such testimony was perjury. (See Exhibit "D".)

VIII

That upon the second trial the jury found petitioner guilty as charged in each of the said Informations and on December 6th, 1940, the trial Court pronounced and rendered its judgment against petitioner, sentencing petitioner to the California State Prison at Folsom for the term prescribed by law on each of the said charges and ordered them to run concurrently. After judgment was pronounced petitioner gave notice of appeal and dismissed his Attorney.

IX

After judgment was pronounced and notice of appeal given petitioner was taken to the Detention Room for prisoners along with the co-defendant, a few minutes later the prosecutor appeared at the door of the Detention Room and requested that petitioner and the co-defendant James W. Gibbons write a letter to the prosecutor stating our views [fol. 5] of the crimes, so that the prosecutor could give petitioner and Gibbons a good recommendation in his report to the Prison Board of Directors under Section 1192a of the Penal Code; that the prosecutor now wished to help petitioner and Gibbons because he feared that petitioner and Gibbons would receive too severe a sentence from the Prison Board of Terms and Paroles. When petitioner asked the prosecutor why he now wished to help petitioner and Gib-

bons after the way he secured the convictions with the perjured testimony, the prosecutor said he did not like the way he had to secure the convictions and that if the prosecutor had not made the witness Eddie Black change his testimony, petitioner and Gibbons would no doubt wone the case; that The State's witness Eddie Black was a two term offender already and the prosecution could make him testify any way they wished, for the prosecution could send said witness to Prison for life as an habitual criminal; that petitioner and Gibbons should have excepted the prosecutor's offer to plead guilty to a lesser offense, for petitioner and Gibbons did not have a chance to win the case as long as the prosecution had Eddie Black for a witness. (See Exhibit "E and F".)

X

That thereafter, petitioner hired another attorney to appeal the case to the District Court of Appeal of the State of California, which was affirmed, (People vs. Marvich, 44 Cal. App. (2d) 858), and a hearing was denied by this Court, Exhibit "C" was in the petition for hearing.

[fol. 6]

XI

That thereafter and on June 28th, 1941, in accordance with the judgments of the said Superior Court, petitioner was delivered to and received at the California State Prison at Folsom, which judgment were secured by the use of perjured testimony knowingly employed by the prosecutor. (See Exhibits "A to F," inclusive). Petitioner was also received a parole violator from San Quentin Prison, which term upon parole violation was terminated by the Prison Board of Directors January 3rd, 1942, and now petitioner is and has been continuously confined since June 28th, 1941, by virtue of the judgment secured by perjured testimony knowingly employed by the prosecutor.

XII

That your petitioner is deprived and restrained of his liberty by no other or different judgment or decrees than those hereinabove mentioned; that the judgements hereinabove mentioned are the sole color of authority whereunder the People of the State of California, and Clyed I. Plummer, Warden, et al., restrains and deprives your petitioner of his lawful right to liberty in violation of the Constitution

of the United States as aforesaid, and the Constitution of the State of California; Section 681 of the Penal Code of California as aforesaid in such case made and provided.

XIII

That as alleged and established by records and facts hereinbefore set forth in this petition, and as disclosed by [fol. 7] the facts appearing in the certified records of the proceedings had in the case of the People of the State of California, Plaintff, vs. Mike Marvich, No. F-182, in the Municipal of Long Beach, County of Los Angeles, State of California, a portion of the testimony given by the State's witness Eddie Black and marked Exhibit "A", and a portion of said State's witness testimony in the case entitled The people of the State of California, Plaintiff, vs. Mike Marvich, Defendant, No. 81823, and The People of the State of California, Plaintiff, vs. Mike Marvich, and James W. Gibbons, Defendants, No. 81824, in the Superior Court of the State of California, in and for the County of Los Angeles, Department C, in the City of Long Beach, Exhibit "B to D" inclusive and is hereby made a part hereof for all purposes with the same force and effect as though herein set forth at length; and the affidavits of petitioner and James W. Gibbons are hereto attached and made a part hereof, marked Exhibit "E and F", that petitioner has been convicted and imprisoned by the use of the perjured testimony of the State's witness Eddie Black and knowingly employed by the prosecution to secure the conviction against petitioner in violation of petitioner's Constitutional rights under Section I, Article XIV, Of The Amendment To The Constitution Of The United States and Section 13, Article I, Of The Constitution Of California and in violation of Section 681 of the Penal Code of California, which petitioner here and now pleads and relies upon for his protection against the wrongs of respondents, The People of the State of California, and Clyde I. Plummer, Warden et al., as hereinbefore and here-[fol. 8] inafter described and as in this petition complained of.

XIV

That hereinbefore, petitioner has petitioned the following Courts for the writ of habeas corpus upon other grounds than herein set forth. The Superior Court of the

State of California, in and for the County of Sacramento, Department No. 4; The District Court of Appeal of the State of California, Third Appellate District; Supreme Court of the State of California and the United States District Court, Northern Division, all of the above said petitions for habeas corpus were denied without a hearing and no opinions were filed. Petitioner has also petitioned the Superior Court of the State of California, in and for the County of Sacramento, Department No. 1, and this Honorable Court (In re Mike Marvich on Habeas Corpus, Crim. No. 4481) upon the ground that perjured testimony was used to secure the convictions against petitioner, but did not allege or establish that the prosecution knowingly employed said perjured testimony as petitioner now contends and establishes in this petition, both of said petitions were denied with no hearing granted and no opinion filed.

XV

That because of the matters herein related and established an emergency exists, and because of the necessity for immiate action to protect, maintain and preserve the Constitutional rights of your petitioner in the premises, and because no other speedy or adequate remedy exists in the ordinary course of law, other than by writ of habeas [fol. 9] corpus, and in order to give effect to the Constitution of California, and to uphold the Constitution of the United States as the supreme law of the land, this Honorable Court is respectfully requested to take immediate and complete jurisdiction of this cause and afford the relief sought thereby.

XVI

That pursuant to the provisions of Article VI, Section 4, of the Constitution of California, petitioner hereby invokes the original jurisdiction to this Honorable Court for his relief and remedy in the premises.

Wherefore, your petitioner prays that a Writ of Habeas Corpus may issue out of and under the seal of this Honorable Court forthwith, directed to the said Clyde I. Plummer, Warden of the California State Prison at Folsom, Represa, California, commanding the said Warden to have and produce the body of your petitioner, Mike Marvich inmate Number 23800, in and before this Honorable Court on 30th day of March, 1943, or as soon thereafter at the

convenience of the Court, at a place and hour to be designated in said Writ, together with the time and cause of your petitioner's imprisonment, custody and restraint, and the said writ, to do and receive what shall then and there be considered by this Honorable Court concerning the said Mike Marvich; to the end that he may be restored to his liberty in accordance with law and justice, that he may go hence without day.

[fol. 10] This petition with memorandum of points and authorities is submitted to stand as a traverse to any and all returns made by respondents. Petitioner will ever pray.

Dated: March —, 1943.

Respectfully submitted, Mike Marvich, petitioner;
In Propria Persona.

Duly sworn to by Mike Marvich. Jurat omitted in printing.

[fol. 11] EXHIBIT "A" TO PETITION

In the Municipal Court of Long Beach,
County of Los Angeles, State of California

Dept. No. 3. Hon. Wilber F. Downs, Judge.

No. F-182. Robbery, A Felony

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff,

vs.

MIKE MARVICH, Defendant

Reporter's Transcript of Preliminary Examination

Exhibit "A" is a portion of Eddie Black's, State's witness, testimony in the above entitled Court and Cause, pages 16 to 22, direct examination.

Exhibit "A" page 12 to 18

Appearances:

For the People: Clarence S. Hunt, Deputy District Attorney of Los Angeles County.

For the Defendant: William J. Findley, 9 Locust Avenue, Long Beach, Calif.

August 1, 1940.

[fol. 12] Q. I call your attention now to the night of March 31, 1940, did you see Mr. Marvich or Meyer Kroll on that night?

A. March——

Q. The 31st?

A. I don't recall the date as March 31.

Q. What is that?

A. I just don't recall the date, the month, certain dates.

Q. At about that time did you see the defenda-t Marvich and your step-brother, Meyer Kroll?

A. I did.

Q. Is there anything by which you can fix the approximate date?

A. Only time I could fix the date would be on the Sunday. I didn't see him at the time. I heard him talking.

Q. You didn't see them at the time. You heard them talking?

A. Yes.

Q. What time of day?

A. It was in the evening.

Q. What time in the evening?

A. It must have been 11 o'clock or a little bit later.

Q. Where did you hear them talking at that time?

A. At the house.

Q. At the house of the address you have given here?

A. No, at that time we lived at 2924 "K" Street.

Q. 2924 "K" Street, San Diego?

[fol. 13] A. Yes, sir.

Q. Who lived at the house at that time?

A. My wife, my kids, and Meyer also.

Q. Your wife, your children, and Meyer also?

A. Yes.

Q. Had Meyer been there the night before?

A. Saturday? No, sir, he was not. He was going on up to Marvich's place.

Q. When did he leave?

A. He left on Saturday.

Q. He left on Saturday?

A. Yes.

Q. You say you heard his voice about 11 o'clock on Sunday night?

A. Yes, sir.

Q. Did you see him or hear him in the meantime?

A. No, sir, I did not.

Q. You knew Mr. Marvich before this occasion?

A. I met him on several occasions.

Q. Were you familiar with his voice?

A. Oh, not exactly.

Q. Enough to identify it?

A. Yes, sir.

Q. When you heard the voice of Meyer Kroll and Mike Marvich, where were you?

A. In bed.

Q. With reference to where you slept, where was Meyer [fol. 14] Kroll's room?

A. Well, about next—in the same—it is a dining room and the bedroom combined. It is a big room.

Q. He slept in the same room you did but another part of it?

A. Not a part of it, but the next bedroom.

Q. You mean the bedroom and the dining room and another bedroom are more or less combined?

A. More or less, yes.

Q. Or was there an opening from one bedroom to the dining room and from the dining room to the other bedroom?

A. There is an opening from the dining room to the bedroom.

Q. Could you hear what was said?

A. I did not.

Q. Did your step-brother have a car at that time?

A. I don't know.

Q. To your kno-ledge did he own a car at that time?

A. He didn't, no, sir.

Q. To your knowledge did Mr. Marvich own a car at that time?

A. No, sir, he did not.

Q. After you heard these voices at about 11 o'clock that night, did you get up at all?

A. No, sir, I did not, because he is used to come and go at night. I never stopped him and asked him any questions.

[fol. 15] Q. Did you see either Mike Marvich or Meyer Kroll after that?

A. The next day, the next morning.

Q. About what time?

A. I didn't see Marvich. I seen Meyer.

Q. What was that?

A. I seen Meyer at that time.

Q. You saw Meyer at that time?

A. Yes, that was on Monday morning.

Q. You say you did not see Marvich?

A. No, sir, I did not.

Q. Did you see Marvich on Monday at all at any time?

A. Yes, sir.

Q. About what time?

A. It must have been 9:00 or 9:30.

Q. In the Morning?

A. Yes.

Q. Where did you see him at that time?

A. At the house.

Q. Was Meyer Kroll there at that time?

A. Yes, sir.

Q. Did you have any conversation with Meyer Kroll or Mike Marvich when they were both present in you- house that morning?

A. I didn't have no conversation at that time but I was in the bedroom, from their bedroom, from his bedroom, from his bedroom to the bath room when I came in there. [fol. 16] I usually come home to eat breakfast about 9:30 after I get through working a couple of hours in the morning and he was there and I talked to Meyer.

Q. You talked to Meyer?

A. Yes.

Q. Where did you talk to Meyer?

A. In his bedroom.

Q. Where was Marvich?

A. He was there present.

Q. He was present?

A. Yes.

Q. That was about 9:30 in the morning?

A. Yes, sir.

Q. Will you tell us what was said or done at that time?

A. Well, I come in. There was a suitcase—they had a suitcase on the bed and opened up the suitcase.

Q. Who opened the suitcase?

A. Meyer did.

Q. Go ahead.

A. I saw all this money.

Q. Will you describe what you saw in the way of money?

A. An enormous amount of money.

Q. In what form?

A. There was a lot of paper money and also wrapped money, silver money wrapped up.

Q. Did you notice anything about any of this silver money or coins which were wrapped in rolls?

[fol. 17] A. Yes, sir.

Q. What did you notice?

A. I noticed "Los Angeles—L. A. Examiner" it said.

Q. Did you have any conversation with Meyer Kroll or Mike Marvich at that time?

A. No, only thing he said he just got that from the L. A. Examiner in Long Beach.

Q. Who said that?

A. Meyer did.

Q. Anything else said at that time?

A. I was too scared to say anything. I didn't stop to say nothing at that time. I told him to get it out of the house as soon as they could.

Q. Can you describe anything about the denominations of any of the paper money you saw there?

A. Yes, sir, there was a lot of hundred dollar bills and fifties. I don't know exactly how many they was. I didn't exactly see.

Q. I call your attention to this revolver, Exhibit "A" for identification, and ask you to look at that?

A. Yes, sir, I bought this gun.

Q. You recognize it, do you?

A. Yes.

Q. Do you recall about when you bought it?

A. Oh no, I couldn't.

Q. Can you tell us approximately whether this year or last year or the year before?

[fol. 18] Q. About what part of this year?

A. It was either March or April, along in March?

Q. About March or April, you say?

A. Yes, March or April. I don't recall exactly.

Q. Calling your attention to this time you saw the money in the bedroom of Meyer Kroll, was it before or after that time that you bought this gun?

A. Before.

Q. About how long before, do you know?

A. About two or three weeks.

Q. Two or three weeks before?

A. Yes.

Q. After you bought the gun what did you do with it?

A. I gave it to Meyer.

Q. You gave it to Meyer?

A. Yes.

Q. About how long after you bought it did you give it to Meyer?

A. A couple of days afterward or the next day.

Q. A day or two after you bought it?

A. Yes.

Q. Did you have it or did you see it from that time until you saw the money in Meyer's bedroom?

A. I never had it at all, no.

Q. When did you see the gun after you gave it to Meyer Kroll? When did you see it next, if at all?

A. The next time I seen it, it was in the house again.

[fol. 19] EXHIBIT "B" TO PETITION

In the District Court of Appeals of the State of California, Second Appellate District

Crim. No. 81823-81824

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent,

vs.

MIKE MARVICH, Defendant and Appellant

Appeal from the Superior Court of Los Angeles County, Hon. Leslie E. Still, Judge

Reporter's Transcript on Appeal

Volume I

Pages 1 to 303 inc.

Exhibit "B" is taken from the transcript of the above entitled case, a portion of the State's witness Eddie Black's

testimony upon direct examination, pages 197 to 201, and in this petition appear on page 19 to 25 inc.

Appearances:

For Plaintiff and Respondent: The State Attorney General.

For Defendant and Appellant: In Propria Persona.

[fol. 20] A. It was around March 23rd.

Q. What year?

A. Same time.

By Mr. Keeler:

Q. Who had the gun at that time?

A. Marvich.

Q. Marvich, the defendant in this case?

A. Yes, sir.

Q. That is the same gun?

A. Yes, sir.

The Court: Keep your voice up all of the time.

By Mr. Keeler:

Q. Now, directing your attention to the 31st day of March, 1940, do you recall that day?

A. Yes, sir.

Q. Did you see these defendants or either of these defendants on that day?

A. I seen one of them.

Q. Which one?

A. Mike Marvich.

Q. When you say Mike, you mean Mike Marvich?

A. Mike Marvich.

Q. Where did you first see him on that day?

A. That day he was in San Diego that morning.

Q. Who else was with him?

A. Meyer Kroll.

Q. All right, what, if anything, did you do?

A. We got in the car and we went to Long Beach.

[fol. 21] Q. What time did you come to Long Beach?

A. About—it was approximately around noon.

Q. When you arrived in Long Beach at noon, what did you do then?

A. Driving around a little while—for a little while and then we went to Los Angeles.

Q. What time did you arrive in Los Angeles?

A. About—we got in Los Angeles—it must have been around 1 o'clock and we stayed in Los Angeles a couple or three hours.

Q. What were you doing while you were in Los Angeles?

A. We were driving around a little while and they went out to look for a car.

Q. Who do you mean?

Mr. Hunt: I move that that be stricken as a conclusion.

The Court: It shall be stricken, that portion that they went out to look for a car.

By Mr. Keeler:

Q. Were Mr. Kroll and Mr. Marvich with you all of the time?

A. Yes, sir.

Q. What did you do for two hours that you were in Los Angeles?

A. Well, we were driving around Los Angeles a few hours. We did not do anything in particular.

Q. Well, did you do anything?

A. Well, I did not do anything at all. I just drove around.

[fol. 22] Q. Did you see Marvich do anything during that two hours?

A. No, I did not. I did not see him do anything.

Q. Did you see Kroll do anything during that two hours?

A I did not.

Q. What did you do then?

A. Well, they left me—they left me—parked my car and left me there and they went away. The- said they would be back later.

Q. All right; how long did you stay in your car?

A. Oh, about an hour.

Q. Well, did they come back or not?

A. Yes, they did.

Q. What did you do then?

A. Well——

Q. Wait just a moment, please. If I may withdraw that question. Did they say anything when they come back?

A. Yes, they did.
Q. What did they say?

Mr. Hunt: Now, I would like to know—start out and not just have a general answer.
Mr. Ball: I imagine, your Honor,——
Mr. Keeler: This is not offered as against the defendant Gibbons at all.
Mr. Ball: We are not charged with any offense on that date anyway, so I guess there is no reason for me to object, your Honor.
[fol. 23] Mr. Keller: That is correct.
Mr. Ball: It hasn't anything to do with us, so we will keep quiet over here.
Mr. Keeler: If possible.
The Court: Well, I could make an answer to that. The objection on your part will be sustained; at least on the ground of indefiniteness.

By Mr. Keeler:

Q. Which one of these men, Mr. Kroll or the defendant Marvich, said something?
A. Mr. Kroll.
Q. Marvich was there?
A. Yes, sir.
Q. What did Mr. Kroll say?
A. He said they could not get a car.
Q. All right; what else was said at that time?
A. Well, they got in my car and they were on their way to Long Beach.
Q. You came back to Long Beach?
A. Yes, sir.
Q. What time did you arrive in Long Beach?
A. Well, it was getting a little dark, I believe—around dusk—around 4 or 5 o'clock probably.

The Court: Keep your voice up.

By Mr. Keller: What did you do after you arrived in Long Beach?
A. Well, they drove around a little bit—for about 10 [fol. 24] minutes and they left me off in—right by a roller skating rink.
Q. That is here in Long Beach?
A. Yes, sir.

Q. Now, at the time they left you off, how was the defendant Marvich dressed?

A. Well, he had on a civilian suit and coat and a pair of pants.

Q. How long did you stay at the roller skating rink?

A. I stayed there quite a while. It was kind of chilly.

Q. Well, can you give us any estimate of the time you stayed there?

A. Approximately an hour and a half or so—two hours —something like that.

Q. Did you see Kroll and Marvich or either of them again that night?

A. Yes, I did.

Q. Where was that?

A. Well, they drove by—I was on the corner and they drove by and they picked me up—they come on up by the curb and I got in the car.

Q. Whose car was that?

A. It was my car.

Q. How was Marvich dressed at that time?

A. Well, at that time he was taking off a sailor uniform.

Mr. Hunt: What is the answer?

[fol. 25] EXHIBIT "C" TO PETITION

Exhibit "C" is from the same transcript as Exhibit "B", and the proceeding took place during the cross examination of the State's witness Eddie Black, and are pages 244 to 246 of said transcript, and appear in this petition on pages 26 to 28 inc.

Mr. Hunt was the Attorney for Petitioner.

Mr. Keeler was the Attorney for the People.

[fol. 26] The Court: Objection will be sustained.

Mr. Hunt: If the Court please, I have an argument that I would like to make in regard to that.

The Court: All right; approach the bench.

(Thereupon, the following proceedings were had at the bench and without the hearing of the jury:)

Mr. Hunt: The contention will be made, that in spite of his apparent falsity in his testimony that he is now testifying to the truth and that even in the face of a possible impli-

cation in the charge he is willing to tell the truth. I think we have a right to show that in spite of the fact that approximately two weeks or better ago he testified to a story that in my humble opinion would make him an accomplice. Nothing in the wide world has happened to him now, whether anyone has promised him immunity—I am not in a position to say but I think I have the right to show facts from which that may be inferred. Immunity in fact is as great as immunity by promise and I believe it is a circumstance that should go before this jury for their consideration because ordinarily a jury might feel that a man would not testify to facts which will show his implication unless they were absolutely true and that he was testifying about this because of conscience but I want to show the circumstances of whether there has been a promise or not it is a fact that nothing happened to him.

The Court: All right; and what particular facts is it that [fol. 27] you rely upon as being different?

Mr. Hunt: What facts do I rely upon?

The Court: Yes, to make him an accomplice?

Mr. Hunt: To make him an accomplice?

The Court: Over what he testified to the last time?

Mr. Hunt: I don't claim that there are any additional facts present at this time in substance that would make him an accomplice but I do contend that the facts that he testified to here which are in substance the same facts he testified to before clearly make him an accomplice. In addition to that, it is clearly apparent from the testimony that has been adduced here that the man committed perjury at the previous trial.

The Court: I don't think there is any question about that. I don't think there is any doubt about the fact that he probably committed perjury at this trial.

Mr. Hunt: That is probably true too.

The Court: I think we can all agree on that.

Mr. Hunt: I presume we all agree on that. The main thing that I want to establish is the circumstance of ever since giving his testimony which, in substance, made him an accomplice, that the man he said committed the robbery on being held on $10,000.00 bail and being prosecuted and he has been at liberty and has not been prosecuted. In other words, I am not in a position to state whether someone promised him immunity but I am in a position to show

[fol. 28] what amounts to immunity in fact and I think that it has evidenciary value so far as establishing what might have motivated this story at the present time.

Mr. Keeler: For the purpose of the record, we object to it as being immaterial what has happened to him for two weeks. It has nothing to do with whether or not he will eventually be prosecuted.

Mr. Hunt: He has not been so far. In other words, it is proper to submit to the jury the fact that he has not been held in custody since, it——

Mr. Keeler: I don't think that w-ether or not he is held in custody has anything to do with the facts to which he is testifying here at the present time.

Mr. Ball: It is not conclusive. It certainly is—definitely has weight.

The Court: Well, so that there will be no dispute about it, so that you have all available opportunity to present your side of your case, I will overrule the objection.

(Thereupon the following proceedings were had within the hearing of the jury.)

The Court: Objection will be overruled.

Mr. Hunt: I wonder if you will refer to that question, Mr. Reporter, so that I will put it in the same form.

(Question read.)

A. I was in Los Angeles.

By Mr. Hunt:

Q. Working there?

[fol. 29] EXHIBIT "D" TO PETITION

IN THE DISTRICT COURT OF APPEALS OF THE STATE OF CALIFORNIA SECOND APPELLATE DISTRICT

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent,

vs.

MIKE MARVICH, Defendant and Appellant

Appeal from the Superior Court of Los Angeles County, Hon. Leslie E. Still, Judge

Reporter's Transcript on Appeal, Volume II

Exhibit "D" is taken from the transcript of the above entitled case, from the opening argument by the prosecutor to the jury, which appears on page 560 line 1 to 23, and on page 562 lines 1 to 25, and appears in this petition on page 30 and 31.

[fol. 30] "• • • Later on they showed him pictures amongst which were these pictures and he picked them out and says, "Yes, those are the men." Counsel may criticize the police department for not putting these two men in show-ups. I know from experience in the trial of cases with Mr. Ball that if they had been placed in the show-up he would use the other argument, of course, they can recognize them for they had been put in a show-up so that they could see them and would know them in court. Ladies and gentlemen, what do you have in addition to the testimony of the seven reputable witnesses? Now, theoretically, at least, I vouch for the character of these witnesses that I place on the stand on behalf of the People, so, theoretically, at least, I vouch for the character of Eddie Black, just as Mr. Ball, theoretically at least, vouches for the character of Kroll: just as Mr. Ball, theoretically, at least, vouches for the character of Mr. Gibbons; and just as Mr. Hunt, theoretically, vouches for the character of Mr. Marvich and Ann Isreal. It is a sad thing in this case, ladies and gentlemen, that we cannot try the case with all reputable witnesses like Slocum and White. These cases are not made. These cases devel-p and it so happens that Eddie Black was the man that could and would and did testify.

[fol. 31] "* * * I don't know whether you people read "True Detective" and other detective magazines but you have had an opportunity in this case to see and hear all types of the criminal element. You have seen the rat in Eddie Black, the man that is going against his pack, the man that is telling something that forever after outlaws him from the criminal world. You have seen the man on this witness stand, Eddie Black, that ratted on these two defendants. From the attitude of Meyer Kroll, he must have ratted on Meyer Kroll too. Now, I don't hold Eddie Black up to you as any ideal of morality or truthfulness but I say to you that you should pay attention to Eddie Black's testimony. You should consider Eddie Black's testimony in the light of the instructions which will be given you by the Court, that if you are convinced that Eddie Black was telling you the truth from this witness stand, in spite of the base character of that witness, you should accept and adopt his testimony. Now, ladies and gentlemen, what else do you have? You have the testimony of Eddie Black's mother and Meyer Kroll's mother, Mrs. Josie Kroll. She doesn't think Eddie is any good. She says Eddie is no good. She is not trying to help Eddie. She thinks Meyer is a good boy. She told you so. She thinks Meyer Kroll is a good boy. She told you so.

[fol. 32] EXHIBIT "E" TO PETITION

AFFIDAVIT OF MIKE MARVICH

MIKE MARVICH, being first duly sworn, deposes and says: That he is the Affiant and on the 6th day of December, 1940, he was in the detention room of the Court House for prisoners with James W. Gibbons, in the City of Long Beach, County of Los Angeles, State of California, that judgment had previously been pronounced and rendered against Affiant and James W. Gibbons in the cases of The People of the State of California, Plaintiff, vs. Mike Marvich, Defendant, Crim. No. 81823, and The People of the State of California, Plaintiff, vs. Mike Marvich and James W. Gibbons, Defendants, crim. No. 81824, that day. The prosecutor Harry Keeler appeared at the door of the said Detention Room between 10:30 A. M. and 11:30 A. M. on the above said day and date, requesting Affiant and James

W. Gibbons to write said prosecutor a letter, stating our views of the crime so that he could give affiant and Gibbons a good recommendation under Section 1192a of the Penal Code, to the Prison Board of Directors as he wished to help affiant and Gibbons. Affiant asked the prosecutor why he now wished to offer help after the way he secured the conviction. The prosecutor stated that he did not like the way he had to secure the convictions and that affiant and Gibbons should have *ex*cepted his offer to plead guilty to a lesser offense, for the State's witness Eddie Black would testify any way the prosecution wanted him to as [fol. 33] he is a two term offender and the prosecution could send him to prison for life as an habitual criminal, the prosecutor then stated if he had not made Eddie Black change his testimony, affiant and Gibbons would have no doubt wone the case. Affiant told the prosecutor that he would appeal the convictions to the Supreme Court if necessary. The prosecutor said this would cost a lot of money and that affiant would have to hire another Attorney to appeal the convictions and if affiant would not appeal the case the prosecutor would give affiant a very good recom-endation to the Parole Board. Affiant refused the prosecutors offer and told him that he was innocent and that the prosecutor knew it, to which the prosecutor replied that he did not know whether affiant was guilty or not, that it was the prosecutor's duty to get a conviction. Affiant told the prosecutor he did not *ex*cept any of the offers to plead guilty to a lesser offense bec-use he was innocent and would not now *ex*cept any of the prosecutor's offers and would not write the requested letter and that if the prosecutor wished to put affiant's statement in his report to the Board, to just state that affiant says he is innocent and was convicted on perjured testimony.

Mike Marvich, Affiant.

Subscribed and sworn to before me this 9th day of March, 1943, Frank A. Gurensey, Notary Public in and for the County of Sacramento, State of California. My Commission expires December 1st, 1945. (Seal.)

[fol. 34] EXHIBIT "F" TO PETITION

AFFIDAVIT OF JAMES W. GIBBONS

JAMES W. GIBBONS, being first duly sworn, deposes and says: That he is the Affiant and on the 6th day of December, 1940, he was in the Detention Room for prisoners in the Jergins Trust Building, the Court House of the City of Long Beach, in and for the County Los Angeles, State of California, that judgment had previously been pronounced against affiant and Mike Marvich who was in the Detention Room at the same time, in the case entitled The People of the State of California, Plaintiff, vs. Mike Marvich and James W. Gibbons, Defendants, case No. 81824. The prosecutor Harry Keeler came to the door of said Detention Room and requested that affiant and Mike Marvich write him a letter so that he could give affiant and Marvich a good recommendation in his report to the Prison Board of Directors; that he now wished to help affiant and Marvich. Mike Marvich asked the prosecutor why he now wished to help us after the way the prosecutor secured the convictions with perjured testimony by Eddie Black. The prosecutor said he did not like the way he had to secure the conviction and affiant and Marvich should have *ex*cepted the prosecutor's offer to enter a plea of guilty to a lesser charge, for affiant and Marvich could not win the case bec-use Eddie Black would testify any way the prosecution wanted him to, for Eddie Black was a two term offender already and the prosecution could send Eddie [fol. 35] Black to Prison for life as an habitual criminal, the prosecutor stated if he did not make Eddie Black change his testimony there is no doubt that affiant and Marvich would have wone the case. The prosecutor then said he believed that some of Marvich's witnesses were not telling the truth. Marvich told the prosecutor that his witnesses would not lie for anyone and to just state in his report to the Board that he was innocent and convicted upon perjured testimony. The prosecutor then said something about not appealing the case to Marvich and Marvich told the prosecutor that he would appeal to the Supreme Court if he had to.

I make this affidavit volentary and not threats or promises have been made by Marvich or anyone else to me.

James W. Gibbons, Affiant.

Subscribed and sworn to before me this 9th day of March, 1943, Frank A. Gurensey, Notary Public in and for the County of Sacramento, State of California. My Commission expires December 1st, 1945. (Seal.)

[fol. 36] MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THE FOREGOING PETITION FOR WRIT OF HABEAS CORPUS "INTRODUCTION"

This proceeding and petition for the writ of habeas corpus requires the determination of the following questions:

I

Did the State's witness Eddie Black commit perjury and, did such perjury lead to the conviction against petitioner on the charges for which he is now being deprived of his liberty?

II

In the event that the State's witness Eddie Black Did commit perjury, did the prosecution cause or suffer such testimony to be introduced knowing that such testimony as given was perjury?

Statement of Facts

Petitioner was convicted in the Superior Court of the State of California, in and for the County of San Joaquin, of the crime of robbery first degree, a felony, and was sentenced to the California State Prison at San Quentin on or about the 3rd day of December, 1934; petitioner's term of imprisonment was fixed at eight and one-half (8-½) years in 1937, by the State Board of Prison Terms and Paroles, and in 1939, petitioner was granted one (1) year of his term on parole by the said Board. Petitioner was released upon parole from San Quentin Prison on the 14th day of December, 1939.

[fol. 37] Petitioner was arrested in San Diego County July 6th, 1940, and later was charged with two crimes of

robbery in the City of Long Beach, County of Los Angeles, State of California, and was given a preliminary examination August 1st, 1940, in the Municipal Court of Long Beach, Department No. 3, at which hearing the State's witness Eddie Black testified, (Exhibit "A"), and on August 15th, 1940, the District Attorney of said County filed two separate informations against petitioner, in one information petitioner was charged alone and in the other information petitioner and James W. Gibbons were charged jointly.

That thereafter, petitioner and James W. Gibbons were placed upon trial before the same jury by stipulation of counsel that the two causes be consolidated. The first trial was in Department C, of the Superior Court of the State of California, in and for the County of Los Angeles, City of Long Beach, Honorable George Dockweiler, Judge presiding. The State's witness Eddie Black took the witness stand and upon direct examination testified in substance as he did at the preliminary hearing as shown by Exhibit "A"; a recess was called shortly after the cross examination started; and after the recess, the prosec-tion again took the said witness over for direct examination, said witness then testified that he did not tell the truth at the preliminary hearing or upon the direct examination but now wished to tell the truth and told a different story. Upon cross examination said witness testified that he had talked to the prosecutor and Deputy Sheriff A. B. Mason [fol. 38] of San Diego County during the recess. This first trial resulted in hung jury and a mistrial was called by the Honorable Leslie E. Still, Judge sitting for the Honorable George Dockweiler, Judge of said Court.

Upon the second trial of the consolidated causes the said witness Eddie Black again changed his testimony and said he was again telling the truth, see Exhibit "B." The second trial was in Department B, of said Superior Court and the Honorable Leslie E. Still, Judge presiding. Both the trial Court and the prosecutor conceded that the State's Witness Eddie Black was committing perjury upon this second trial, see Exhibit "C", but the prosecutor in his argument to the jury vouched for the truthfulness of said witness's testimony, see Exhibit "D". Petitioner was convicted upon the second trial and judgment was pronounced on December 6th, 1940, sentencing petitioner to the California State Prison at Folsom for the term pre-

scribed by law on each of the said charges and that they run concurrently and concurrently with the unexpired portion of the sentenced petitioner had yet to serve upon parole violation or unexpired term.

Petitioner was delivered to the custody of the Warden of the California State Prison at Folsom on the 28th day of June, 1941, upon said judgments and upon parole violation. On January 3rd, 1942, the Prison Board of Directors made an order discharging petitioner from said parole violation and declaring petitioner's term as set at San Quentin expired.

I

[fol. 39] The perjured testimony of the State's witness Eddie Black resulted in the convictions against petitioner.

This first point needs very little argument, for both the prosecution and the trial Court conceded out of the hearing of the jury and petitioner, that the State's Witness Eddie Black was committing perjury upon the trial which petitioner was convicted. (See Exhibits "A to C", inc.) The jury was at no time informed by the trial Judge or by anyone else that the witness was committing perjury other than when petitioner took the witness stand and denied the allegations.

The first jury evidently did not believe the said State's witness for they were unable to agree upon a verdict. Certainly it was the prejured testimony of said State's witness that caused the jury to find petitioner guilty, for petitioner presented evidence that he was not in *in* the County when the robbery took place, nor did petitioner live in the County, petitioner's actions before, during the time and after the robberies were accounted for by Parole officers reports and friends.

II

The Prosecution Knowingly Employed Perjured Testimony To Secure The Convictions Against The Petitioner

As hereinbefore shown by Exhibits "A, B and C," there is no question about the fact that the State's Witness Eddie Black committed perjury and that petitioner was convicted upon said perjured testimony. The prosecutor after conceeding out of the hearing of the jury, argued to the jury [fol. 40] that they should believe the testimony of Eddie

Black and vouched for the truthfulness of the perjured testimony, see Exhibit "D".

As stated in the petition in paragraph IX, and shown by Exhibit "E and F," the prosecution knowingly employed the perjured testimony, which resulted in the convictions against petitioner.

Petitioner has studied over the late decision by this Honorable Court in the Case of In re Mooney, 10 Cal. (2d) 1, but petitioner's case is much different from that of the Mooney case, supra, in petitioner's case the perjured testimony is in the record of the case and the Exhibits taken from the records show the method used by the prosecutor to secure the convictions against petitioner and the prosecutor's own statements to Petitioner and James W. Gibbons as show by Exhibit "E and F", prove that the prosecutor caused such perjured testimony to be given against petitioner.

The Exhibits A to F, inclusive, comply with what was required in the case of re Mooney, supra, the Court said on page 15 and 16, that:

"According to the recent decision of the United States Supreme Court in this matter, supra, it is incumbent upon petitioner in this proceeding, if he is to accomplish his release, that he establish by a preponderance of substantial, credible evidence not only that perjured testimony was adduced upon his trial, but also, if such be the fact, that it [fol. 41] was knowingly produced by the prosecuting officials. Proof of both elements, perjury and knowledge, by a preponderance or credible evidence, is indispensable under that decision. . ."

The perjured testimony as aforesaid knowingly employed by the prosecution, denied petitioner his Constitutional rights of the Privileges and Immunities, Due Process of Law, and Equal Protection of the Laws, Guaranteed by Article XIV, Section I, of the Amendment to the Constitution of the United States, and Article I, Section 13, of the Constitution of California.

In the case of Mooney v. Holohan, 294 U. S. 103, 55 S. Ct. 340, 79 L. Ed. 791, 98 A. L. R. 406, the Honorable Supreme Court of the United States said:

". . . That requirement, is safeguarding the liberty of the citizen against deprivation through the action of the State, embodies the fundamental conceptions of justice

which lie at the base of our civil and political institutions. Hebert v. Louisiana, 272 U. S. 312, 316, 317. It is a requirement that cannot be deemed to be satisfied by mere notice and hearing if a State has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance by a State [fol. 42] to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation. And the action of prosecuting officers *of* behalf of the State, like that of administrative officers in the execution of its laws, may constitute state action within the purview of the Fourteenth Amendment. That Amendment governs any action of a State, "whether through its legislature through its courts, or through its executive or administrative officers. . ."

Section 681 of the Penal Code of the State of California provides that:

"No person can be punished for a public offense, except upon a legal conviction in a Court having competent jurisdiction thereof."

Relief and Remedy

A Writ of Habeas Corpus is the appropriate remedy to secure the relief herein prayed for, for petitioner could not raise these points on appeal because it was not until after judgment was pronounced and notice of appeal given that petitioner found out that the prosecution knowing employed the perjured testimony, (Exhibit "E and F"), and petitioner was without counsel at that time and knew of no way such evidence could be placed in the record on appeal, but petitioner did place in his brief on appeal what now is [fol. 43] Exhibit "C", but the District Court of Appeal made no mention of it and this Honorable Court denied petitioner a hearing. This Honorable Court said in the case of In re Mooney, supra, that:

"Therefore, proof of perjury alone, without satisfactory substantial proof of knowledge thereof or connivance therein by the prosecuting officials, can avail the petitioner nothing in this proceeding but would relegate him to the executive department * * *."

Section 1473 of the Penal Code of California, provides that:

"Every person unlawfully imprisoned or restrained of his liberty, under any pretense whatever, may prosecute a writ of habeas corpus to inquire into the cause of such imprisonment or restraint."

The office of the writ of habeas corpus is to afford the citizen a speedy and effective method of securing the removal of any unlawful restraint upon his liberty; and the statute which confers the rights has always been construed in favor of the liberty of the citizen. In re Rider, 50 Cal. App. 797, 801, the Court said:

"Respondent's argument places too narrow limits upon the high prerogative writ of habeas corpus, the right whereto is guaranteed by the constitution. By express statutory enactment, it may issue in all cases where the petitioner is unlawfully "restrained of his liberty."

[fol. 44] In the case of Walker v. Johnson, 61 S. Ct. 574, the Supreme Court of the United States said:

"In other circuits, if an issue of fact is presented, the practice appears to have been to issue the writ, have the petitioner produced, and hold a hearing at which evidence is received. This, we think, the only admissible procedure. Nothing less will satisfy the command of the statute that the judge shall proceed "to determine the facts of the case, by hearing the testimony and arguments." It is not a question what the ancient practice was at common law or what the practice was prior to 1867 when the statute from which R. S. 761 is derived was adopted by Congress the question is what the statute requires.

As we said in Johnson v. Zerbst, 304 U. S. 458, 466, 58 S. Ct. 1019, 1024, 82 L. Ed. 1461, "Congress has expanded the rights of a petitioner for habeas corpus * * *. There being no doubt of the authority of the Congress to thus liberalize the common-law procedure on habeas corpus * * * it results that under the sections cited a prisoner in custody * * * may have a judicial inquiry * * * into the very truth and substance of the causes of his detention * * *." Such a judicial inquiry involves the reception of testimony, as the language of the statute shows."

[fol. 45] Section 1484 of the Penal Code of California, provides that:

"• • • The Court or judge must thereupon proceed in a summary way to hear such proof as may be produced against such imprisonment of detention, or in favor of the same, and to dispose of such party as the justice of the case may require, and have full power and authority to require and compel the attendance of witnesses, by process of subpoena and attachment, and to do and perform all other acts and things necessary to a full and fair hearing and determination of the case.

In view of the facts in this petition, Exhibits, Memorandum of points and Authorities and authorities cited, petitioner has alleged and established by substantial, credible evidence not only that perjured testimony was used to secure the convictions against petitioner but that the prosecution knowingly employed such perjured testimony which resulted in the conviction of petitioner in violation of petitioner's Constitutional rights as aforesaid and petitioner claims and relies upon these Constitutional rights to secure his relief from the said unlawful restraint and imprisonment as aforesaid.

In view of the fact of the present case, and the dominant requirement of the Fourteenth Amendment to the Constitution of the United States, a writ of habeas corpus is the appropriate remedy, and should issue, to secure the relief herein prayed for.

[fol. 46] Petitioner will ever pray.

Respectfully submitted, Mike Marvich, In Propria Persona, Petitioner.

Address of Petitioner: Mike Marvich, Box 23-800, Folsom State Prison, Represa, California.

[fols. 47-55] IN SUPREME COURT OF THE STATE OF CALIFORNIA
IN BANK

Criminal No. 4490

In re MARVICH on Habeas Corpus

ORDER DENYING WRIT OF HABEAS CORPUS—Filed March 22, 1943

Petition for writ of habeas corpus Denied.

Gibson, Chief Justice.

Dated: March 22, 1943.

[File endorsement omitted.]

[fol. 56] SUPREME COURT OF THE UNITED STATES

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS—June 7, 1943

On Consideration of the motion for leave to proceed herein *in forma pauperis*,

It Is Ordered by this Court that the said motion be, and the same is hereby, granted.

Per Mr. Chief Justice Stone.

[fol. 57] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed June 7, 1943

The petition herein for a writ of certiorari to the Supreme Court of the State of California is granted, and the case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on Cover: In forma pauperis. Enter petitioner pro se. File No. 47,498. California, Supreme Court. Term No. 997. Mike Marvich, Petitioner, vs. The People of the State of California and Clyde I. Plummer, Warden, et al. Petition for a writ of certiorari and exhibit thereto. Filed May 3, 1943. Term No. 997 O. T. 1942.

FILE COPY

FILED
OCT 14 1943
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 60

MIKE MARVICH,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA
AND CLYDE I. PLUMMER, WARDEN, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA.

BRIEF FOR PETITIONER.

NEIL BURKINSHAW,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 60

MIKE MARVICH,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA AND CLYDE I. PLUMMER, WARDEN, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

BRIEF FOR THE PETITIONER.

Opinions Below.

There is no opinion of the Supreme Court of the State of California. The opinion of the California District Court of Appeals affirming the conviction in the criminal case is reported in 44 California Appeals 2nd, 858.

Jurisdiction.

The judgment sought to be reviewed was entered on March 22, 1943 (R. 30). Certiorari was granted by this

Court on June 7, 1943 pursuant to Section 237 b of the Judicial Code.

Question Presented.

Whether the Supreme Court of California erred in summarily refusing without a hearing the writ of habeas corpus, wherein petition alleged that petitioner was convicted after the prosecution knowingly had used perjured evidence against him.

Statement of Facts.

Petitioner was convicted by a jury in a California state court on consolidated informations charging him with the crime of robbery, the first offense taking place on March 31, 1940, and the second on June 30, 1940.

Petitioner was sentenced as a second offender to the California State prison at Folsom. On appeal the judgment was affirmed by the District Court of Appeals, State of California (*People* v. *Marvich*, 44 Cal. App. (2d) 858).

The petition for habeas corpus is excellently drawn and is supported by strong exhibits. However, it is deemed desirable to set forth the statement of facts as appearing in the opinion affirming petitioner's conviction, so that the significance of certain aspects of the exhibits may appear.

> "The two victims, Slocum and White, were partners in the distribution of the Los Angeles Examiner in the City of Long Beach, their place of business being at 338 East Third Street. At about 6:25 p. m. on March 31, 1940, appellant entered the place of business of Slocum and White, *dressed in a sailor's uniform.* (Emphasis supplied.) At the point of a revolver he compelled Slocum to open the safe and empty the money into a small suit case which appellant placed on the floor. The amount taken by the appellant was $2,357.00. At about 1:30 p. m. on June 30, 1940, appellant and Gibbons went to the same establishment and found present Virgil E. White and

several other persons. At the point of a revolver they were ordered to get back to the counter and lie down on the floor. The robbers compelled one of the victims to open the safe and dump money from it into a bag. The sum of $983.00 was taken at this time." (*People* v. *Marvich,* 44 Cal. App. (2d) 858.)

On March 22, 1943, petitioner, a layman acting in his own behalf, filed an original application for a writ of habeas corpus in the Supreme Court of California. Petitioner charges that his imprisonment is a result of deprivation of rights guaranteed him by the Constitution of the United States and the Constitution of California in that the California prosecuting authorities obtained his conviction by the presentation of testimony known by the prosecution to be perjured. The petitioner alleges that on August 1, 1940 (R. 1 and 2) he pleaded not guilty on arraignment to two separate informations charging him with the commission as a second offender of two separate felonies, and that upon the perjured testimony of an ex-convict, Eddie Black, the State's main witness, petitioner was held for trial in the Superior Court of the State of California in and for the County of Los Angeles (R. 2). Petitioner further alleges the district attorney for the above County and State on August 15, 1940, filed two separate informations against petitioner based upon the perjured testimony of Eddie Black (R. 2).

Exhibit A of the petitioner (R. 7-12 inclusive) is a portion of the direct examination of Eddie Black. The significant feature of this testimony is that Black testified that at no time did he see the petitioner on March 31, the date of the first felony, but merely heard his voice about 11:00 that night. The witness was in bed at the time and told of hearing the voice of Marvich in an adjoining room. He said that he saw Marvich the day after the felony in the bedroom of Meyer Kroll. There was a suit case containing

paper and silver money lying open on Kroll's bed. In the course of a conversation with Kroll and Marvich, Kroll said that he had "just got that from the Los Angeles Examiner in Long Beach."

The first trial of the petitioner on both informations resulted in a hung jury. The petitioner alleges (R. 2) that the State's witness, Eddie Black, testified in substance as he had at the preliminary hearing. Shortly after cross-examination started a recess was called and after said recess Eddie Black upon redirect examination testified he had been giving perjured testimony at the preliminary hearing and upon the first direct examination and now wished to tell the truth, and thereupon told a different story. The petition does not specify in what respects the story told by Black at that time was different.

Petitioner again was placed on trial with James W. Gibbons on November 18, 1940. Kroll apparently was not tried, at least at that time. Gibbons was charged with taking part in the second robbery. At this trial Black testified (R. 12-16 inclusive) that he had seen Marvich and Kroll in San Diego on the morning of the day the first felony was committed. He said he had seen them first in San Diego and that thereafter the three went to Long Beach and thereafter to Los Angeles, arriving in Los Angeles about 1:00 p. m. (Tr. 14) and remaining for two or three hours; that they returned to Long Beach about four or five o'clock in the afternoon, where the others left him at the vicinity of a roller skating rink for approximately one and one-half or two hours (R. 15).

At that time, Black testified, Marvich was wearing civilian clothes (R. 16), but on their return to pick him up near the skating rink, *Marvich was taking off a sailor's uniform.* (Emphasis supplied.)

At this second trial, in a colloquy taking place at the bench during the cross examination of Black, petitioner's

attorney stated it was clearly apparent from the testimony of Black that he had committed perjury at the previous trial (Tr. 17). The following occurred: The Court: "I don't think there is any question about that. I don't think there is now any doubt about the fact that he probably committed perjury at this trial."

The petitioner's attorney: "That is probably true too."

The Court: "I think we can all agree on that."

Petitioner's attorney: "I presume we all agree on that * * *."

The record would appear to indicate that the prosecutor remained silent as to that phase of the discussion.

The prosecutor in his argument to the jury (R. 19-20) said he "theoretically at least" vouched for the character of Eddie Black. He urged the jury to pay attention to Eddie Black's testimony. His contention was that despite Black's base character, the jury should accept and adopt his testimony if persuaded he was telling the truth.

Exhibits E and F of the petition (R. 20-23 inclusive) are affidavits made by petitioner and his co-defendant Gibbons. These affidavits recite that, following imposition of sentence on the day of their conviction, the prosecutor, Harry Keeler, appeared at the detention room of the courthouse and asked them to write him a letter stating their views of the crime so that he could give petitioner and his co-defendant a good recommendation to the prison board of directors. Petitioner asked the prosecutor why he wished to offer help "after the way he secured the conviction". The prosecutor stated "he did not like the way he had to secure the convictions and that he and Gibbons should have accepted his offer to plead guilty to a lesser offense, for the State's witness, Eddie Black, would testify any way the prosecution wanted him to as he is a two term offender and the prosecutor could send him to prison for life as an habitual criminal; the prosecutor then stated if he had not

made Eddie Black change his testimony affiant and Gibbons would no doubt have won the case * * *."

Affiant refused the prosecutor's offer and told him that he was innocent and that the prosecutor knew it, to which the prosecutor replied "he did not know whether affiant was guilty or not; that it was the prosecutor's duty to get a conviction."

The memorandum of points and authorities filed in support of this petition (R. 25) indicates that petitioner's defense at the trial was that he was not in the county when the robbery took place.

The petition for habeas corpus was filed in the Supreme Court of the State of California on March 15, 1943 (R. 1); the order denying the writ was entered by that Court on March 22, 1943. This Court on June 7, 1943, granted a motion for leave to proceed in forma pauperis and entered its order allowing certiorari. On June 14, counsel for the petitioner was appointed by this Court.

Specification of Errors.

The Supreme Court of California erred:

1. In peremptorily refusing the issuance of the writ of habeas corpus sought in a petition wherein petitioner alleged denial of due process and equal protection of the laws under the rights guaranteed him by the Constitution of the United States and the State of California.

2. The Supreme Court of California erred in failing to take testimony with respect to the verity of the allegations set forth in the petition.

Summary of Argument.

The petitioner charges that his conviction was brought about by the use knowingly by the prosecution of perjured testimony.

The duty of the Court in the circumstances required the issuance of the writ and the taking of testimony touching on the averments of the petition.

The peremptory refusal of the writ was error.

Argument.

The denial of the writ of habeas corpus by the Supreme Court of California was tantamount to the Court sustaining a demurrer to allegations of undoubted gravity with respect to the denial of petitioner's right to due process and equal protection of the laws under the 14th Amendment to the Constitution of the United States. The action of the Court is also violative of the provisions of Article 1, Section 13, of the Constitution of California, and of Sections 681 and 1484 of the Penal Code of California. The Supreme Court of California erred, it is respectfully submitted, in failing to determine the verity of the charges contained in the petition.

Article 1, Section 13, of the Constitution of California is as follows:

> "In criminal prosecutions in any court whatever, the party accused shall have the right to a speedy and public trial; to have the process of the court to compel the attendance of witnesses in his behalf, and to appear and defend, in person and with counsel. No person shall be twice put in jeopardy for the same offense; nor be compelled in any criminal case to be a witness against himself; nor be deprived of his life, liberty, or property without due process of law * * *."

Section 681 of the Penal Code of the State of California provides:

> "No person can be punished for a public offense except upon a legal conviction in a court having competent jurisdiction thereof."

Section 1484 of the Penal Code of California reads as follows:

> "The court or judge must thereupon proceed in a summary way to hear such proof as may be produced against such imprisonment or detention or in favor of the same and to dispose of such petition as the justice of the case may require, and to have full power and authority to require and compel the attendance of witnesses by process of subpoena and attachment, and to do and perform all other acts and things necessary to a full and fair hearing and determination of the case."

The petition and supporting exhibits charge, first, that perjured testimony was used; second, that this fact was known to the prosecutor; and third, that the prosecutor after the trial conceded these allegations. While it is true that the prosecution in the course of the colloquy at the bench did not join the trial judge and petitioner's counsel in their views as to Black's perjury, the fact nevertheless remains that he stood silent while these observations were being made. The record discloses no effort on the part of the prosecutor to come to the defense of his witness.

The present proceeding has not as its object the matter of ascertaining truth or falsity of these allegations of the petition. That was the duty of the California court. It has as its object a review of the action of the Supreme Court of California in peremptorily refusing a writ of habeas corpus without taking proof touching on these grave accusations. The picture presented by the petition and exhibits is not pretty. It charges that a state's witness, an ex-convict, shifted his testimony to a degree that suggested the probability of perjury to the mind of the trial judge. The shift was such as to have shocked the conscience. Black testified at the preliminary hearing and for a time during the first trial of the case that he had not seen petitioner the day of the robbery (R. 7-12 inclusive). Indeed, his testimony at

the preliminary hearing included an admission of Kroll that he, Kroll, was the man executing the robbery (R. 11). The facts as found in the appellate court opinion, reviewing the conviction, would indicate that the robbery was perpetrated by a single individual.

When Black shifted his testimony, he said he had been in company with petitioner and Kroll virtually all the day of the felony. He added the damning fact, insofar as petitioner is concerned, that petitioner was removing a sailor's uniform on his return to the skating rink to pick up the witness. That the scales between the prosecution and defense had been closely balanced may be assumed from the fact that at the first trial of this case the jury was unable to agree.

Next, petitioner's allegations as to the prosecutor's admission that he had been compelled to have Black change his testimony are supported by the affidavit of the co-defendant Gibson. These charges required intensive inquiry as to their verity or falsity.

The action of the California Supreme Court in refusing the writ is in the teeth of *Mooney* v. *Holohan*, 294 U. S. 103, pages 112, 113, and of *Pyle* v. *Kansas*, 317 U. S. 213-15-16, and *Walker* v. *Johnson*, 312 U. S. 275, pages 286, 7. In deciding the *Mooney* case, a landmark of the law, this Court said:

> "• • • That requirement, in safeguarding the liberty of the citizen against deprivation through the action of the State, embodies the fundamental conceptions of justice which lie at the base of our civil and political institutions. Hebert *v.* Louisiana, 272 U. S. 312, 316, 317. It is a requirement that cannot be deemed to be satisfied by mere notice and hearing if a State has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be per-

jured. Such a contrivance by a State to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation. And the action of prosecuting officers on behalf of the State, like that of administrative officers in the execution of its laws, may constitute state action within the purview of the Fourteenth Amendment. That Amendment governs any action of a State, 'whether through its legislature, through its courts, or through its executive or administrative officers' * * *:"

The *Pyle* case bears a singular analogy to the instant case. In that case this Court held:

"Habeas corpus is a remedy available in the courts of Kansas to persons imprisoned in violation of rights guaranteed by the Constitution of the United States. Cochran *v.* Kansas, 316 U. S. 255, 258, 86 L. Ed. 1453, 1455, 62 S. Ct. 1068. Petitioner's papers are inexpertly drawn, but they do set forth allegations that his imprisonment resulted from perjured testimony, knowingly used by the State authorities to obtain his conviction, and from the deliberate suppression by those same authorities of evidence favorable to him. These allegations sufficiently charge a deprivation of rights guaranteed by the Federal Constitution, and, if proven, would entitle petitioner to release from his present custody. Mooney *v.* Holohan, 294 U. S. 103, 79 L. ed. 791, 55 S. Ct. 340, 98 A. L. R. 406. They are supported by exhibits referred to above, and nowhere are they refuted or denied. The record of petitioner's conviction, while regular on its face, manifestly does not controvert the charges that perjured evidence was used and that favorable evidence was suppressed with the knowledge of the Kansas authorities. No determination of the verity of these allegations appears to have been made. The case is therefore remanded for further proceedings * * *."

Walker v. *Johnson* does not at first appear to be precisely in point because it treats of the procedure in habeas

corpus in Federal courts. However, when there is considered Section 1484 of the Penal Code of California, hereinbefore quoted, it will be perceived that *Walker* v. *Johnson* has strong application.

It is respectfully submitted that in view of Section 1484 of the California Penal Code, the procedure specified in *Walker* v. *Johnson* should have been followed. In that opinion this Court said:

> "Without repeating the allegations of the petition and traverse, which have been summarized above, we think it clear that, taken together, they overcome the presumption of regularity which the record of the trial imports and that, if the facts alleged were established by testimony to the satisfaction of the judge, they would support a conclusion that the petitioner desired the aid of counsel, and so informed the District Attorney, was ignorant of his right to such aid, was not interrogated as to his desire or informed of his right, and did not knowingly waive that right, and that, by the conduct of the District Attorney, he was deceived and coerced into pleading guilty when his real desire was to plead not guilty or at least to be advised by counsel as to his course. If he did not voluntarily waive his right to counsel, or if he was deceived or coerced by the prosecutor into entering a guilty plea, he was deprived of a constitutional right. On a hearing, he would have the burden of sustaining his allegations by a preponderance of evidence. It is true that they are denied in the affidavits filed with the return to the rule, but the denials only serve to make the issues which must be resolved by evidence taken in the usual way. They can have no other office. The witnesses who made them must be subjected to examination ore tenus or by deposition as are all other witnesses. Not by the pleadings and the affidavits, but by the whole of the testimony, must it be determined whether the petitioner has carried his burden of proof and shown his right to a discharge. The Government's contention that his allegations are improbable

and unbelievable cannot serve to deny him an opportunity to support them by evidence. On this record it is his right to be heard.

The judgment is reversed and the cause remanded to the District Court for further proceedings in conformity with this opinion."

The position taken by the State of California, as reflected in the brief filed in Court in opposition to the petition for certiorari, appears to be that *Mooney* v. *Holohan* and subsequent similar cases have no application unless all the testimony is perjured. Counsel for petitioner respectfully submits that such a contention on the part of the State of California is straining the plain meaning of the *Mooney* case and placing upon it a restricted, awkward construction. The test resides in the fact of whether perjured testimony knowingly was used by the prosecution. The quantum thereof is not controlling.

Conclusion.

It is submitted that the instant cause should be remanded to the Supreme Court of California with instructions to proceed in conformity with the opinions of this Court, as expressed in *Mooney* v. *Hollohan, Pyle* v. *Kansas,* and *Walker* v. *Johnson, supra.*

Respectfully,

NEIL BURKINSHAW,
Attorney for Petitioner,
Shoreham Building,
Washington, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 60.

MIKE MARVICH,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA and CLYDE I. PLUMMER, Warden, *et al.*,

Respondents.

Motion to Remand Cause and Affidavit in Support Thereof.

To the Honorable Chief Justice and to the Honorable Associate Justices of the Supreme Court of the United States:

In view of the insufficient and incomplete character of the existing state of the record in the above entitled cause, and in order that said record may be completed, the issues involved clarified, and all question removed as to the manner and method by which petitioner's conviction was obtained, respondents deem it appropriate and necessary that this proceeding be remanded to the Supreme Court

of the State of California for further proceedings on the petition for a writ of *habeas corpus;* and

Motion is hereby respectfully made and presented by counsel for the respondents that such disposition of the matter be made by this Honorable Court.

ROBERT W. KENNY,
Attorney General of the State of California,

EUGENE M. ELSON,
Deputy Attorney General,
Counsel for Respondents.

IN THE

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MIKE MARVICH,

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THE PEOPLE OF THE STATE OF CALIFORNIA and CLYDE I. PLUMMER, Warden, *et al.,*

Respondents.

Affidavit of Eugene M. Elson.

State of California, County of Los Angeles—ss.

EUGENE M. ELSON, being duly sworn, deposes and says:

That he is a member of the bar of this Honorable Court and is now and at all times herein mentioned has been a Deputy Attorney General of the State of California, and that his office is located at 600 State Building, in the City of Los Angeles, State of California; and that he makes this affidavit in support of the motion of respondents to remand the above entitled cause to the Supreme Court of the State of California for further

consideration of the application of petitioner to that court for a writ of *habeas corpus*.

The record before this Honorable Court purporting to be a record of the proceedings in the State Court resulting in a judgment of conviction of petitioner is by no means a sufficient or complete record of such proceedings. Said completed record is available and is on file in your affiant's office and does not show nor is it the fact that the prosecution in said action, or at any stage of said proceedings, offered the witness Eddie Black knowing that he would give perjured testimony. The prosecutor in said case in the trial court has prepared an affidavit refuting the charges made against him by the affidavits of petitioner and said James W. Gibbons [Exhibits "E" and "F" to the petition for certiorari herein, R. 20-23] and is prepared to file the same with the Supreme Court of the State of California or testify before that court on the entire subject if and when the occasion demands.

The record on appeal in said case consists of 585 pages of Reporter's Transcript of testimony and discloses that in addition to the witness Eddie Black, 15 witnesses testified for the prosecution, and that besides the two victims involved in said proceedings, 6 other witnesses identified petitioner as the perpetrator of the crime charged. No claim is made by the petitioner in any of the proceedings before this Court, nor has the claim been made at any other time that any of said witnesses perjured themselves.

In view of the present incomplete state of the record before this Court, your affiant respectfully suggests that the ends of justice will best be served by remanding the case to the Supreme Court of the State of California for further consideration of the application for a writ of *habeas corpus*, a procedure heretofore followed by this Honorable Court in the case of *Frank S. Connor*, Petitioner, *v. The People of the State of California, et al.*, 309 U. S. 631, 60 S. Ct. 708 (1940), at which time the entire and complete record may be brought before that court together with such evidence, if any, supplementary thereto as may be necessary to enable that court to determine the issues involved.

EUGENE M. ELSON.

Subscribed and sworn to before me this ..... day of November, 1943.

ROBERT W. KENNY,
Attorney General of the State of California,

By FRANK RICHARDS,
Deputy Attorney General.

No. 60. MARVICH *v.* CALIFORNIA ET AL. Certiorari, 319 U. S. 739, to the Supreme Court of California. November 15, 1943. *Per Curiam:* The motion of respondent to remand is granted, the judgment is vacated and the cause is remanded to the Supreme Court of California for further proceedings. *Mr. Neil Burkinshaw* for petitioner.

Messrs. Robert W. Kenny, Attorney General of California, and *Eugene M. Elson,* Deputy Attorney General, for respondents. Reported below: 44 Cal. App. 2d 858, 113 P. 2d 223.